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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 748

[Docket No. 110331231-2684-01]

RIN 0694-AF19

Revisions to Authorization Validated End-User Provisions: Requirement for Notice of Export, Reexport or Transfer (In-Country) and Clarification Regarding Termination of Conditions on VEU Authorizations

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule

SUMMARY: In this rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) by adding a requirement for persons shipping under Authorization Validated End-User (VEU) to send written notice of such shipments to the recipient VEU. BIS further amends the EAR to clarify that when items subject to item-specific conditions under Authorization VEU no longer require a license for export or reexport or become eligible for shipment under a license exception, as set forth in the EAR, VEU's are no longer bound by the conditions associated with the original receipt of such items. On April 17, 2012, BIS published a proposed rule and requested public comments on these topics (77 FR 22689). The comment period closed June 18, 2012. BIS has addressed the public comments received in response to the proposed rule in this final rule.

DATES: This rule is effective [INSERT DATE THIRTY DAYS AFTER DATE OF PUBLICATION].

FOR FURTHER INFORMATION CONTACT: Karen H. Nies-Vogel, Chair, End-User Review Committee, Bureau of Industry and Security, U.S. Department of Commerce, 14th St. and Pennsylvania Avenue, NW, Washington, DC 20230; by telephone: (202) 482-5991, fax: (202) 482-3911, or e-mail: ERC@bis.doc.gov.

SUPPLEMENTARY INFORMATION:

Background

Authorization Validated End-User (VEU)

Validated end-users (VEUs) are those entities located in eligible destinations to which eligible items may be exported, reexported, or transferred (in-country) under a general authorization instead of a license. VEU and their respective eligible destinations and eligible items are identified in Supplement No. 7 to Part 748 of the EAR. VEU may obtain eligible items without having to wait for their suppliers to obtain export licenses from BIS.

VEUs are reviewed and approved by the U.S. Government in accordance with the provisions of Section 748.15 and Supplement Nos. 8 and 9 to Part 748 of the EAR. The End-User Review Committee (ERC), composed of representatives from the Departments of State, Defense, Energy and Commerce, and other agencies, as appropriate, is responsible for administering the VEU program.

On April 17, 2012, BIS published a rule soliciting public comments on two proposed amendments to Section 748.15 of the EAR (Authorization Validated End-User (VEU)) (77 FR 22689). BIS proposed requiring persons exporting, reexporting, or transferring (in-country) under Authorization VEU to send written notification to the recipient VEU with details about their shipment within seven days of the shipment. In addition, BIS proposed explicitly clarifying in the EAR that VEU's that are subject to item-specific conditions and have received items subject to such conditions under Authorization VEU would no longer be bound by the conditions associated with the items if the items no longer require a license for export or reexport to the VEU's location or become eligible for shipment under a license exception to the destination. BIS received comments from two entities, which are summarized and responded to below.

Comments and Responses

Comment 1: Both commenters indicated their overall support for the proposed changes and the VEU authorization as a whole. One commenter specifically noted that Authorization VEU had benefited a VEU and its supplier by allowing the purchase and

supply of equipment to proceed without the additional lead-time issues often caused by potentially lengthy government approvals.

Response: BIS appreciates this input regarding the VEU program, particularly in light of BIS's efforts to improve the program and make it more effective for U.S. exporters.

Comment 2: Both commenters explained that individual shipments may include items shipped under “multiple authorizations” including Authorization VEU. They asked BIS to clarify that proposed paragraph (g) of Section 748.15 would only require that shippers notify VEUs of items shipped under Authorization VEU and not of items shipped under other authorizations in the same shipment as VEU items. Specifically, one commenter recommended that notification be required to include “a list of the VEU authorized contents and a list of their respective ECCNs.”

Response: BIS recognizes that individual shipments may include items authorized for shipment or transfer under Authorization VEU as well as items being shipped under other EAR authorizations, such as licenses or license exceptions. BIS intends that the notification be required only for items shipped under Authorization VEU and not for any other items shipped with the VEU-authorized items. BIS has amended the text of Section 748.15(g) to specify that the notification requirement applies only to the “VEU-authorized” items in a shipment and to specify that the list suggested by the commenter be included as part of the notification.

Comment 3: Both commenters asked BIS to review its approach to the timing and frequency of notifications under Section 748.15(g). Both commenters recommended that BIS permit consolidated notifications under Authorization VEU, rather than require separate notifications for each shipment under Authorization VEU. Specifically, one commenter provided a semiconductor industry-specific example of the multiple transfers of an integrated circuit's layout or design that may be necessary between a semiconductor foundry and its customer to correct design flaws prior to production. The commenter suggested that the exporter should be required to provide only a single notification for such shipments. In addition, both commenters asked that BIS clarify that notification may be made before shipment occurs. One of the commenters specifically suggested that the timing be modified to "no later than seven days after shipment or as mutually agreed in writing by both parties." This commenter further suggested that BIS could require that the terms of VEU notification be included in Section 748.15(e), which requires that exporters and reexporters obtain from VEUs certifications regarding end use and compliance with VEU requirements. The commenter expressed that this approach would maximize benefits and minimize burdens associated with notification, and would ensure transparency and help to verify compliance.

Response: BIS has reviewed the timing and frequency of notifications and agrees that exporters, reexporters and transferors (in-country) should have the option to consolidate notifications to VEUs when multiple shipments are made under Authorization VEU. BIS therefore has included this as an option in Section 748.15(g). Further, as the timeframe for notification that is appropriate for one VEU and shipper may be inappropriate for

others, BIS agrees with the commenter who suggested that notification be within a timeframe that is mutually agreed to in writing by both parties. That mutual agreement must, however, be reached prior to the shipment or transfer. With reference to the comment proposing that BIS require the notification to be included in the certification required under Section 748.15(e) of the EAR, BIS notes that the 748.15(e) certification is required under the EAR only in advance of the first shipment by a supplier to a VEU under Authorization VEU and at no other time thereafter and that while provision of the 748.15(e) certification is the sole responsibility of the VEU, advance agreement on the notification schedule is the responsibility of both the VEU and the shipper. Although a VEU and a shipper may agree to include the notification schedule in the certification, BIS will not require that the schedule be included in the certification. BIS has revised Section 748.15(g) by providing that notifications should be made within a timeframe agreed to in writing by the VEU and the shipper in advance of the initial shipment and has removed the reference to “within seven calendar days” of the shipment. With this modification, BIS clarifies its original intent to permit notification in advance of shipment.

Comment 4: One commenter expressed concern regarding BIS’s explanation in the proposed rule that, “BIS intends to improve the ability of VEUs to determine which authorization their suppliers utilized. This will enable VEUs to better determine which set of conditions governs their use of the received item(s) more efficiently, thereby increasing the VEUs’ compliance.” The commenter asked that BIS modify this explanation to make clear that the notification requirement’s purpose is not to require that companies be able to distinguish between identical items sent under a VEU authorization

and other types of authorization. The commenter noted that when identical parts and materials shipped or transferred under different authorizations are commingled within inventories, some VEUs ensure compliance with U.S. law by meeting the requirements of the most restrictive conditions associated with a particular stock-keeping unit (SKU) and keep track of the total quantity of items received under a specific authorization through first-in-first-out (FIFO) and other standard inventory accounting methods.

Response: The use of Authorization VEU requires VEUs to track items received under Authorization VEU, but does not require VEUs to distinguish between identical items sent under Authorization VEU and other types of shipping authorizations. BIS understands that, as a practical matter, individual items in inventory may not be easily or efficiently tracked, and that there are VEUs that fulfill their requirements under Authorization VEU by meeting the most restrictive conditions associated with a particular SKU and tracking the total quantity of items received under a specific authorization through the standard inventory accounting methods described by the commenter.

Comment 5: One commenter encouraged BIS to consider expanding the scope of Authorization VEU by implementing the VEU program in countries other than China and India.

Response: BIS is taking this comment under advisement and is not responding to it here as it is outside the scope of BIS's proposed rule.

Amendments to Section 748.15 of the EAR

Prior Notification Requirement

In this rule, BIS adopts the amendment to the EAR proposed on April 17, 2012 (77 FR 22689) with some changes. In the April rule, BIS proposed amending Section 748.15 by adding paragraph (g) to require persons exporting, reexporting, or transferring (in-country) under Authorization VEU to send written notification to the recipient VEU with details about their shipment within seven days of the shipment. The April proposal also specified that the notification must include a list of the VEU-authorized contents of the shipment and the quantity of such items that are being, have been, or will be shipped to the respective VEUs, as well as a list of the applicable Export Control Classification Numbers (ECCNs) for VEU-authorized items included in the shipment. This final rule adopts the notification requirement in §748.15 while making a change from the proposed rule by providing that notification must be made within a timeframe agreed to in writing by the VEU and the persons exporting, reexporting or transferring (in-country), rather than within seven days of the shipment as proposed in the April rule. This final rule also adds that the VEU and the persons exporting, reexporting or transferring (in-country) must agree to the notification timeframe in advance of shipment under Authorization VEU.

As discussed in the proposed rule, the purpose of this new requirement is to enhance the ability of VEUs to comply with the requirements of the VEU program. This amendment to the EAR is not the result of non-compliance with VEU requirements by existing

VEUs. With this amendment to the EAR, BIS intends to improve the ability of VEUs to determine which shipments are made to them under Authorization VEU. The use of Authorization VEU requires VEUs to track items received under Authorization VEU, but does not require VEUs to distinguish between identical items sent under Authorization VEU and other types of shipping authorizations. Accordingly, this amendment will enable VEUs to better determine which set of conditions governs their use of the received item(s) more efficiently, thereby better enabling the VEUs' compliance with the EAR.

With this rule, BIS is not requiring a specific form of communication (*e.g.*, fax, e-mail, letter) for the notification, but does require that it be in a written format. Similarly, the VEU and the shipper may determine if notifications need to be made for each Authorization VEU shipment or whether multiple shipments may be the subject of a consolidated notification. As noted above, the notification must be conveyed to the VEU within the time period agreed to in writing by the VEU and the persons exporting, reexporting or transferring (in-country) the VEU items in advance of the initial shipment. VEUs are required to maintain the notifications they receive and exporters and reexporters are required to maintain the notifications they send pursuant to their recordkeeping requirements.

Clarification Regarding Termination of Conditions on VEU Authorizations

In the proposed rule, BIS also proposed amending Section 748.15(h) to clarify that VEUs that are subject to item-specific conditions and have received items subject to such conditions under Authorization VEU are no longer bound by the conditions associated

with the items if the items no longer require a license for export or reexport to the VEU's authorized location or become eligible for shipment under a license exception to the destination. This amendment is the same, in effect, as existing Section 750.7(i) (Terminating license conditions), which generally applies to exporters and reexporters who have shipped under license. No public comments were received on this proposal, and the proposed regulatory text is being adopted with minimal changes, described below.

To supplement the proposed regulatory text, BIS is adding phrasing in paragraph (h) to clarify that when the EAR are amended such that items previously exported, reexported or transferred (in-country) to a VEU under Authorization VEU would be eligible for shipment to the VEU under a License Exception, the items received under Authorization VEU become subject to the terms and conditions of the applicable License Exception and not the original conditions associated with export, reexport or transfer under Authorization VEU. In addition, when the EAR are amended such that items previously exported, reexported or transferred (in-country) to a VEU under Authorization VEU would remain subject to the EAR but become eligible for export without a license under the EAR, the items received under Authorization VEU may only be exported, reexported, transferred (in-country) or disposed of in accordance with the EAR. These two statements are not substantive and were added only in the interest of clarifying the scope of new paragraph (h) on requirements under the EAR. These new sentences also parallel existing Section 750.7(i) (Terminating license conditions).

Records Review

In the proposed rule, BIS further proposed adding new paragraph (i) to Section 748.15 to remind exporters that records requirements for shipments that were made under Authorization VEU prior to the removal of a license requirement or the availability of a license exception remain subject to the review requirements of paragraph (f)(2) of section 748.15 on and after the date that the license requirement was removed or the license exception became applicable. No public comments were received on this provision, and BIS is adopting paragraph (i) as proposed.

Since August 21, 2001, the Export Administration Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp., p. 783 (2002)), as extended most recently by the Notice of August 15, 2012 (77 FR 49699, August 16, 2012), has continued the EAR in effect under the International Emergency Economic Powers Act. BIS continues to carry out the provisions of the Export Administration Act, as appropriate and to the extent permitted by law, pursuant to Executive Order 13222.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of

harmonizing rules, and of promoting flexibility. This rule has been determined to be not significant for purposes of Executive Order 12866.

2. Notwithstanding any other provisions of law, no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This final rule involves information collections previously approved by the OMB under control number 0694-0088, “Multi-Purpose Application”, which carries a burden hour estimate of 45.8 minutes to prepare and submit form BIS-748, which involves requirements in connection with Authorization VEU. BIS revised the burden hour estimate shown for the 0694-0088 collection by two minutes to include the notification requirement proposed in this rule. This revision does not represent a significant increase in burden hours for submitting information under the collection.

3. This rule does not contain policies with Federalism implications as that term is defined under Executive Order 13132.

4. The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this rule would not have a significant economic impact on a substantial number of small entities. The basis for the certification was published in the preamble to the proposed rule and is not repeated here. BIS received no comments or new information regarding the certification. Therefore, a final regulatory flexibility analysis is not required and none has been prepared.

List of Subjects in 15 CFR Part 748

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

Accordingly, part 748 of the Export Administration Regulations (15 CFR Parts 730 - 774) is amended as follows:

PART 748 – [AMENDED]

1. The authority citation for 15 CFR Part 748 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 15, 2012 (77 FR 49699 (August 16, 2012)).

2. Section 748.15 is amended by adding paragraphs (g), (h) and (i) to read as follows:

§ 748.15 Authorization Validated End-User (VEU).

* * * * *

(g) *Notification requirement.* Exporters and reexporters shipping under Authorization VEU and persons transferring (in-country) under Authorization VEU are required to provide the VEUs to which they are shipping or transferring notice of the shipment or transfer. Such notification must be conveyed to the VEU in writing and must include a

list of the VEU-authorized contents of the shipment or transfer and a list of the ECCNs under which the VEU-authorized items in the shipment or transfer are classified, as well as a statement that the items are being, will be, or were shipped or transferred pursuant to Authorization VEU. Notification of the export, reexport or transfer (in-country) to the VEU must be made within a timeframe agreed to in writing by the VEU and the person exporting, reexporting or transferring (in-country). The VEU and the person exporting, reexporting or transferring (in-country) must agree to the notification timeframe prior to the initial shipment or transfer under Authorization VEU. Depending on the agreement between the VEU and the person exporting, reexporting or transferring (in-country), a notification may be for individual shipments or for multiple shipments. Exporters, reexporters and VEUs are required to maintain the notifications they send or receive in accordance with their recordkeeping requirements.

(h) *Termination of Conditions on VEU Authorizations.* VEUs that are subject to item-specific conditions and have received items subject to such conditions under Authorization VEU are no longer bound by the conditions associated with the items if the items no longer require a license for export or reexport to the PRC or India, as applicable, or become eligible for shipment under a license exception to the destination. Items that become eligible for a License Exception are subject to the terms and conditions of the applicable License Exception and the restrictions in § 740.2 of the EAR. Items that become eligible for export without a license and that remain subject to the EAR may only be exported, reexported, transferred (in-country) or disposed of in accordance with the requirements of the EAR. Termination of VEU conditions does not relieve a validated

end-user of its responsibility for violations that occurred prior to the availability of a license exception or prior to the removal of license requirements.

(i) *Records*. Records of items that were shipped under Authorization VEU prior to the removal of a license requirement or the availability of a license exception remain subject to the review requirements of paragraph (f)(2) of this section on and after the date that the license requirement was removed or the license exception became applicable.

DATED: December 12, 2012

Kevin J. Wolf

Assistant Secretary
for Export Administration

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